TRIPS Non-Discrimination Principle: Are Alice and Bilski Really the End of NPEs?

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The Supreme Court's decision in *Bilski*, and even more so in *Alice*, has substantially reduced the level of patent protection provided to software and business methods in the U.S.. Nevertheless, Article 27(1) TRIPS establishes that WTO countries must provide protection to any invention, whether product or process, without discrimination based on the field of technology. Is the U.S. currently in violation of its TRIPS obligations?

Although there is no clear understanding among WTO countries on whether Article 27(1) TRIPS covers software and business methods, the U.S. has consistently interpreted this provision as requiring these subject matters to be protected. This happened particularly in the context of the review of other countries' IP laws when they became members of the WTO. Thus, it appears unlikely that the U.S. will be able to argue otherwise in future international negotiations or a possible WTO challenge on §101 of the U.S. patent code - as interpreted by the *Alice* and *Bilski* decisions. More importantly, this result exposes the U.S. to opposing strategies by other WTO countries that diminish its ability to promote TRIPS compliance in a significant way.

The relevance of the conformity of the *Alice* and *Bilski* decisions to Article 27(1) TRIPS goes beyond the appropriate level of protection that must be provided to software and business methods to avoid a violation of international obligations on patentable subject matter. Much more is at stake. Indeed, NPE activity in the U.S. is very much dependent on the availability of enforceable software and business methods patents. The issuance of the decisions in *Alice* and *Bilski* appears to have seriously harmed the operation of these companies. However, the international perspective provided in this article raises the question as to whether these two decisions indeed represent the last word on the eligibility of processes to receive patent protection, or whether there will be additional interventions of the Supreme Court to restore protection on software and business methods to a more intermediate level.

Finally, in recent years there has been substantial discussion on patent reform to curtail NPE activity. However, the aftermath produced by the *Alice* and *Bilski* decisions seems to have reduced the urgency for a legislative intervention in this area. This article highlights that this conclusion might be premature, and that if it is indeed established that the operation of NPEs harms innovation, patent reform might still be necessary to effectively limit the activity of these companies.